

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FRANCIS L. HOLTOM
Claimant

VS.

BAHM CONSTRUCTION, INC.
Respondent

AND

ALLIED MUTUAL INSURANCE
Insurance Carrier

Docket No. 1,008,901

ORDER

Claimant requests review of a preliminary hearing Order Denying Medical Treatment entered by Administrative Law Judge Brad E. Avery on April 10, 2003.

ISSUES

The Administrative Law Judge (ALJ) determined that claimant did not suffer personal injury by accident that arose out of and in the course of his employment with respondent and claimant failed to prove that he gave notice to the respondent within 10 days of the alleged injury. Accordingly, preliminary hearing benefits were denied.

The issues for review are whether claimant suffered a work-related accident and injury as alleged and, if so, did respondent receive timely notice of claimant's accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record compiled to date, the Appeals Board (Board) finds that the ALJ's Order Denying Medical Treatment should be affirmed.

Claimant worked for respondent for eight years primarily as a truck driver. Claimant alleges he was securing a load in Columbia, Missouri, on October 19, 2002, when he injured his back. Claimant admits he did not tell any of his supervisors that he had an accident or had suffered an injury, but contends "You could tell by the way I was walking around. I told them my back was hurt. I always told them my back hurt."¹

Claimant has a long history of back problems and claimant's supervisors were aware of this. Accordingly, it was not unusual for claimant to complain about his back or exhibit signs of back pain at work. But respondent denies claimant ever mentioned to any supervisor, or that any supervisor was aware of an accident or a work-related aggravation of his pre-existing back problems.

Claimant's position is that his supervisors witnessed his accident or were otherwise aware of his injury and that this constitutes notice of an accident. Respondent contends it was not aware of any accident or allegation of a work-related injury until it received the letter from claimant's attorney dated January 28, 2003. This was beyond the 10-day notice period. Furthermore, as that letter was more than 75 days after the alleged accident, claimant cannot rely upon the provision in K.S.A. 44-520 that permits an extension of the time for giving notice to 75 days from the date of accident if claimant's failure to notify respondent within 10 days was due to just cause. As a result, just cause is not an issue. Furthermore, claimant alleges his accident was a sudden and traumatic event which caused significant pain. There is no question but that claimant was aware he had injured his back and that the injury was directly attributable to his employment.

The ALJ apparently found claimant was not credible, and disbelieved claimant's testimony that he suffered a work-related injury as alleged. The ALJ also disbelieved claimant's testimony that he either gave timely notice of his accident and injury to a supervisor, or that a supervisor had actual knowledge of an accident and injury. The Board likewise is not persuaded by claimant's contradictory testimony, particularly in light of the contrary testimony by respondent's witnesses. In addition, despite having previous experience with obtaining medical treatment from respondent for a work-related injury, in this instance claimant neither requested medical treatment from respondent nor submitted his chiropractic bills to respondent for payment. Finally, there is substantial evidence that claimant did not work on October 19, 2002, the alleged date of accident. Therefore, the

¹ P.H. Trans. at 7.

Board finds that claimant has not met his burden of proving he sustained injury by accident arising out of and in the course of employment and that there was timely notice of same.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.²

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order Denying Medical Treatment dated April 10, 2003, entered by Administrative Law Judge Brad E. Avery, should be and is hereby, affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2003.

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
John F. Carpinelli, Attorney for Respondent and Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² K.S.A. 44-534a(a)(2).